

ISSUES

The ALJ found that claimant suffered an accidental injury arising out of and in the course of his employment with respondent on January 3, 2008. As a result of that injury she assigned an 8 percent permanent partial disability to the whole body along with a permanent partial general (work) disability.¹

Respondent requests review of the ALJ's Award and based upon the parties' stipulations at oral argument before the Board, the issues to be determined herein are significantly narrowed. Respondent argues that claimant's January 3, 2008 injury is not compensable because he failed to establish that he suffered any physical change resulting in injury or permanent impairment from the alleged January 3, 2008 accident. Claimant admits he began suffering from significant low back pain with radiating symptoms into his right knee in September 2007. And after a course of conservative treatment both from an orthopaedist and a chiropractor, he briefly improved. But after the January 3, 2008 accident, his symptoms returned. Respondent argues that the January 3, 2008 accident was nothing more than a temporary aggravation of a condition that already existed and left him with no permanent impairment attributable to that temporary aggravation. Accordingly, respondent asks the Board to reverse the ALJ's findings and conclusions with respect to a permanent injury.²

Claimant concedes he did have a prior instance of low back complaints in September and October 2007, but argues that condition resolved and the January 3, 2008 accident served to permanently aggravate his underlying degenerative condition which led to an onset of increased symptoms and ultimately the need to quit work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be modified.

The ALJ accurately and adequately set forth the facts and circumstances surrounding claimant's accident. Therefore, the Board will not restate those facts but instead, will adopt the ALJ's recitation as its own and only reiterate those facts necessary to explain the Board's findings.

¹ The Award granted claimant an 87.5 percent work disability commencing February 2, 2009 and continuing until June 30, 2009. Thereafter, the work disability decreased to 81 percent and continues until further order or until the maximum payout is reached.

² There appears to be no dispute that respondent is responsible for the medical bills associated with claimant's care post-January 3, 2008 as even a temporary injury entitles an injured employee to reasonably necessary care to cure and relieve him/her of the effects of the injury. K.S.A. 44-510h.

1. Did claimant sustain a personal injury by accident arising out of and in the course of his employment on January 3, 2008?

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁵

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.⁶

Here, it is uncontroverted that claimant suffered an onset of low back pain along with significant pain to his right knee beginning in September 2007. He sought chiropractic treatment with Dr. Randy Schmidt followed by treatment with his family physician, Dr. Allen Hooper, who referred him to Dr. Matthew Henry, and orthopaedist. An MRI was performed on his back and according to claimant, Dr. Henry concluded claimant’s pain was not due to a problem with his back and referred claimant to Dr. Leonard Fleske, for an evaluation on his right knee. Oddly enough, Dr. Fleske recommended epidural injections to claimant’s knee *and* back. Following the first injection to claimant’s back, his pain complaints lessened considerably. He was able to forego using crutches to ambulate and continue working in his restaurant performing all his normal duties. Claimant had 2 more injections and according to him, he achieved no additional benefit beyond the first injection.

³ K.S.A. 2007 Supp. 44-501(a).

⁴ K.S.A. 2007 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

⁶ *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

Claimant continued to seek treatment with Dr. Schmidt, who reviewed claimant's MRI results and diagnosed a herniated disc at L5-S1 on October 1, 2007. Dr. Schmidt provided a total of 8 treatments to claimant from August 27, 2007 up to December 31, 2007. Dr. Schmidt's office notes reflect that claimant demonstrated a positive straight leg response and a positive response on the Bechterew's test. These tests both suggest there was a nerve entrapment in the lumbar area. On December 28, 2007, claimant voiced complaints of low back pain with the right knee pain somewhat less than in earlier visits and was told by Dr. Schmidt to return in a few days.

The day after the January 3, 2008 slip and near-fall, claimant returned to Dr. Schmidt and complained of severe right leg pain. During this examination claimant had many of the same positive signs as he had demonstrated before. Dr. Schmidt concluded that claimant herniated a disk "again"⁷ meaning that the claimant was experiencing an irritation of the branch of the sciatic nerve due to either an acute swelling or a herniated disc, as had happened before.⁸ Dr. Schmidt went on to testify that the acute swelling or reherniation occurred, in his opinion, on January 3, 2008.

Claimant returned to see Dr. Hooper, who noted the January 3, 2008 accident and referred him to another neurosurgeon. Claimant was evaluated by Dr. Ali B. Manguoglu in May 2008 and was diagnosed with right sided leg pain due to disc herniation at L3-4 along with a narrowing of the spinal canal. Dr. Manguoglu testified that he reviewed the September 2007 MRI and compared it with the more recent one performed in May 2008 (at his request). According to Dr. Manguoglu, both MRI's are exactly the same.⁹ He further testified that the January 3, 2008 accident represented a temporary aggravation of claimant's underlying condition and that although claimant experienced some improvement in late 2007, his condition was not resolved.¹⁰

At his counsel's request, claimant was evaluated by Dr. Paul Stein, a neurosurgeon. According to Dr. Stein, claimant had degenerative changes throughout his lower back, mild stenosis at a couple of levels and the appearance of a disc protrusion between the 3rd and 4th lumbar disc on the right. When asked, he conceded that there was little difference between the two MRI scans, although he later clarified this by explaining that there is little difference that can be *seen*. He believes there could be minor elements of structural change that cannot be seen on the scan. Dr. Stein also testified that he believed that the January 3, 2008 accident aggravated claimant's underlying pathology. He explained his

⁷ Schmidt Depo. at 16.

⁸ *Id.* at 16-17.

⁹ Manguoglu Depo. at 8.

¹⁰ *Id.* at 23; See also Ex. 2 (Dr. Manguoglu's letter to Rick Garrison at Farmer's Insurance dated May 19, 2008).

view of claimant's condition, and its relationship to his earlier complaints of low back pain in 2007 as follows:

Well, first of all, as I said, no structural which I think that we could see. There could be minor elements of structural change that we don't see, but I think what happens is you've got a nerve that is next to a disc protrusion. It previously was irritated. It responded to treatment, but it's still in a precarious position. It's sort of like a man on a tight rope who kind of loses his balance, regains his balance and keeps walking, but he still has a significant risk of losing his balance again and this time falling off the rope, so I think if you didn't have that precarious situation before you might not have had the result from the injury that occurred, but it doesn't surprise me and it certainly isn't uncommon in patients with significant degenerative disc disease not to see a major change in the structure but to have significant symptomatology from an aggravation.¹¹

When presented with this evidence, the ALJ concluded that -

The claimant clearly met with personal injury by accident arising out of and in the course of his employment on January 3, 2008. The real issue is whether the accidental injury caused a temporary or permanent aggravation of the claimant's pre-existing condition. It is clear that the claimant was experiencing severe back pain in August of 2007 for which he sought treatment. By testimony and review of medical records, the claimant received epidural injections which were of great benefit. The claimant testified that he received significant relief from the first injection and was almost pain free. The records also indicated significant relief.¹²

The ALJ went on to note that claimant was injured on January 3, 2008 and again expressed similar low back and leg complaints received conservative treatment including injections but did not achieve the same level of relief. "He could not return to his regular job duties without restrictions. Dr. Stein, the treating physician determined that due to the fact that the claimant did not return to his pre-injury baseline, that the aggravation was a permanent one."¹³

The ALJ relied on Dr. Stein's opinions, as he was the one who had reviewed all of claimant's records, examined and treated claimant, and awarded claimant an 8 percent functional impairment as well as a work disability (because he was no longer earning a comparable wage).

¹¹ Stein Depo. at 47.

¹² ALJ Award (Nov. 20, 2009) at 8.

¹³ *Id.* at 9.

The Board has considered the entire record, the parties' briefs and oral arguments and concludes that the ALJ's Award should be affirmed in part and modified in part. The Board agrees with the ALJ's factual conclusion that claimant established that he sustained an accidental injury arising out of and in the course of his employment on January 3, 2008.

K.S.A. 2007 Supp. 44-508(d) defines "accident":

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2007 Supp. 44-508(e) defines "personal injury" and "injury":

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

Here, claimant was returning from performing inventory and suffered a significant onset of pain to his lower back on January 3, 2008. Those symptoms compelled him to seek treatment from his chiropractor and ultimately, his family physician. Like the ALJ, the Board is persuaded that claimant sustained an accidental injury arising out of and in the course of his employment with respondent on January 3, 2008. The Board is not, however, persuaded that claimant sustained a permanent injury as a result of that accident.

The difficulty in this claim is that the symptoms claimant describes immediately following this January 3, 2008 accident are identical to those he first expressed in September 2007. And while an aggravation of his underlying pathology would be compensable under Kansas law,¹⁴ the greater weight of the evidence supports the Board's view that claimant's January 3, 2008 aggravation did not result in permanent impairment. Rather, he suffered a temporary aggravation of his low back condition.

¹⁴ It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

The physicians generally agree that the MRI films taken in September 2007 and May 2008 are identical and reflect a L3-L4 disc protrusion¹⁵, although Dr. Stein suggests that it is often difficult to appreciate the structural changes that can occur. Yet, claimant's physical symptoms post-injury are the same as those from September to December 2007. He found it necessary to walk with crutches in order to continue ambulating both before January 3, 2008 and after. Claimant complained of low back pain and right leg complaints both before January 3, 2008 and after. Although his symptoms may have waxed and waned over those few months in 2007, he continued to see his chiropractor up until late December, 2007. And Dr. Schmidt's notes from his last visit with claimant in 2007 indicate he wanted to see claimant again *in three days* for further evaluation and treatment. As Dr. Manguoglu noted, everything about claimant's condition is the same when you compare his symptoms and complaints from September to December 2007 and those expressed after January 3, 2008.¹⁶ Based upon this evidence, the Board finds the ALJ's Award should be modified to reflect the finding that claimant sustained a temporary aggravation of his underlying condition as a result of his January 3, 2008 accident. Claimant returned to baseline from that aggravation as of May 19, 2008.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 20, 2009, is affirmed in part and reversed in part as follows:

Claimant is not entitled to any permanent impairment compensation based upon the finding that claimant sustained a temporary aggravation of his underlying condition as a result of his January 3, 2008 accident.

Claimant is entitled to payment of the dental bill in the sum of \$321.00 and \$1,025.09 to be paid to Edwards Co. Hospital & Clinic for payment of an unpaid balance.

¹⁵ Stein Depo. at 41.

¹⁶ Manguoglu Depo. at 8-9, 23.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Karl Wenger, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge